IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (HMA) No.312 of 1999.
Judgment reserved on:16.04.2007.
Decided on: April 24, 2007

Sunita Devi **…..Appellant.**

VERSUS

Shakti Kumar **…..Respondent.**

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Mr.Subhash Sharma, Advocate.**

For the Respondent: **None.**

Kuldip Singh, Judge.

This appeal has been filed by the wife against the decree of dissolution of marriage passed by learned District Judge, Una on 28th September, 1999 in HMA Petition No.20 of 1997.

2. The brief facts of the case are that respondent has filed petition under Section 13 of the Hindu Marriage Act), 1956 (hereinafter referred to as 'the Act') for dissolution of marriage of the parties on the grounds of desertion and cruelty.

3. The case of the husband is that the marriage between the parties was solemnized on 9th September, 1991 at Village Ajauli Tehsil & District Una. The parties lived together but in December, 1991 wife

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment ? yes***

went to her parents' house and thereafter did not return to her matrimonial home. The husband left for Bhopal on some training. The wife gave birth to a female child on 19th June, 1992 at her parents' house. The wife after about 1 ½ months of birth of the child came to the house of the husband in his absence and left the child with the parents of the husband and herself went to her parents' house and never enquired about the child. In May 1993 the husband came back from Bhopal after completing training. The plight of the child with the old parents of the husband caused mental shock, torture and cruelty to the husband. He approached the wife and her parents and asked her to accompany him but she did not come. Thereafter, on persuasions made by relations the wife came back from her parents' house to the matrimonial home and after stay of two days again went to her parents' house in August 1993 and since then she has not lived with the husband. On account of desertion and cruelty of the wife, relations between the parties have become bitter and it is not possible for them to live together as husband and wife. On these pleas the husband filed the petition on the grounds of desertion and cruelty caused by the wife.

4. The wife contested the petition and pleaded that husband left Bhopal and in absence of the husband, mother-in-law of the wife maltreated her and started quarreling with her. The wife tolerated this. The husband returned from training and the parties, including the

child, were living in the house of the husband, who at the instigation of his mother began to misbehave with the wife and they collusively kept the child with them and took the wife to her parents' house on the pretext of seeing her parents and left the wife at her parents' house. The husband never came back to take her. The wife was taken back by the husband at the instance of S.P. but she was again turned out without child in September 1995 and thereafter she was never taken back by the husband. After waiting for sufficient long time, the matter was again brought to the notice of S.P. in March 1997 but when husband came to know about this, he filed the divorce petition. The wife has taken the plea that husband has withdrawn from the society of the wife since September 1995 without any reasonable excuse. She is willing to go back and live with her husband. She has denied desertion and cruelty on her part.

5. The learned District Judge has allowed the petition on the ground of desertion only.

6. I have heard the learned counsel for the appellant / wife and have also gone through the record.

7. The learned counsel for the appellant has submitted that wife has not deserted the husband. On the contrary, the husband has created circumstances which have compelled the wife to live with her parents. It is the husband who has withdrawn from the society of the wife. He cannot take benefit of his own wrong. The wife has no

intention to live separately, rather she is interested to live with the husband. The learned counsel, by taking help of explanation to Section 13 of the Act, has submitted that the wife has reasonable cause to live separately and, therefore, the husband has failed to make out a case of desertion. He has also submitted that the petition was filed on the grounds of cruelty and desertion. The learned trial Court has rejected the ground of cruelty. The contention of learned counsel for the wife is that cruelty comes first and desertion later and once the learned trial Court has rejected the ground of cruelty, therefore, there is no question of desertion on the part of the wife.

8. The husband has appeared as his own witness as PW-1 and has supported his case. He has been cross examined at length but nothing favourable has been elicited by the appellant from the cross examination of the husband. PW-2 Om Parkash is the father of the husband. He has stated that appellant left her daughter with him and his wife after about 1 ½ months of her birth. Thereafter, she never came to their house. It has been suggested to him in cross examination that because of the birth of the girl his family was not happy with the appellant and they started maltreating her. This suggestion has also been given by the appellant to husband also in cross examination.

9. The appellant has also appeared as RW-2. She has stated that after giving birth to the daughter she went to her

matrimonial home but because of the birth of a girl child her in-laws were not happy. She has further stated that during training husband came twice on leave and he left her at her parents' house. She has also stated that after the completion of training the treatment of the husband with her was not good. The husband kept the daughter with him and she was left at her parents' house and thereafter he never came to take her back. However, her father left her in his parents' house. She, in her cross examination, has admitted that since May 1994 she has not visited the husband. She has also admitted that her daughter is living with her grand parents. RW-2 Sagli Ram is the father of the wife. In his statement he has stated that because of less dowry and the appellant has given birth to a daughter, the husband was not happy with her.

10. In her reply, the wife has taken the plea that her mother-in-law was not happy with her for not bringing the gifts after the birth of the child, she has also pleaded that on account of the birth of the female child she has been turned out from the house. She has also taken the plea that 2-4 months after the birth of the female child she was taken to the in-laws by her father and the relations were cordial. There is inconsistency in the pleas of the wife taken in the reply. In evidence also, except for bald statements of appellant as RW-2 and her father Sagli Ram (RW-3), she has not proved her defence by corroborative independent evidence. She has admitted that the

daughter of the parties is living with the respondent and she did not visit the respondent after 1994. The explanation to Section 13 of the Act supports the case of the husband rather the defence of appellant / wife. The husband has proved on record that appellant / wife without reasonable cause has withdrawn from the society of husband and she has now no intention to join him in the matrimonial home. The husband has not only proved the factum of desertion but has also proved *animus deserendi* on the part of the wife not to return to the matrimonial home.

11. The learned counsel for the appellant has also submitted that cruelty comes first and desertion later and since learned Court below has rejected the petition on the ground of cruelty, therefore, there is no question of desertion in the present case on the part of the wife. This argument of learned counsel for the appellant is noticed only to be rejected. The grounds of cruelty and desertion for dissolution of marriage are separate grounds. In case the petition fails on the ground of cruelty then it cannot be inferred that the petition must fail on the ground of desertion also. The husband has proved the case of desertion by leading cogent evidence. Even as per the case of the wife, the parties are living separately for more than 13 years. The argument of the learned counsel for the appellant that appellant is ready to go now to live with husband cannot be accepted at this stage. No relief can be granted to the wife on the basis of this

offer. The petition has been filed on the basis of cause of action which was available to the husband which he has proved as far as desertion is concerned. Moreover, it appears, the offer of wife to live with the husband now is not coming from her heart nor it is genuine. During the pendency of this appeal, she did not take concrete steps to show her sincerity towards the offer she has made through her counsel.

12. The marriage between the parties is already dead. No purpose will be served by uniting them. Let them live separately and peacefully now. The learned District Judge, after appreciation of the evidence, has rightly dissolved the marriage on the ground of desertion. No case has been made out by the appellant for interference.

13. No other point was urged.

14. In view of above discussion, the appeal is dismissed and the impugned judgment and decree are upheld. Interim order dated 25th October, 2000 passed in CMP No.593 of 1999 shall stand vacated. The parties are left to bear their own costs.

(Kuldip Singh)
Judge.

April 24, 2007
(soni)